STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVON LOWMAN,

Defendant-Appellant.

UNPUBLISHED
December 9, 2003

No. 241444
Manistee Circuit Court
LC No. 01-003164-FH

Before: Whitbeck, C.J., and Hoekstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for assault of a prison employee, MCL 750.197c. Defendant was sentenced to three and a half to six years' imprisonment. On appeal, defendant argues that the trial court erred when it admitted prejudicial evidence, rejected defendant's request to instruct the jury on lesser offenses, and upwardly departed from the sentencing guidelines. Defendant also argues that he was denied his right to a speedy trial. Because we find all of defendant's assignments of error unpersuasive, we affirm his conviction and sentence.

Defendant was an inmate in a correctional facility. While in the dinner hall at the prison, Officer Michael Supianoski encountered defendant. Supianoski testified that he conducted a "shake-down" on defendant consisting of a pat-down of his outer clothing. Either during the shake-down or at a point where Supianoski was looking down at defendant's identification card, defendant struck Supianoski in the face with his fist. Other corrections officers were present in the hall and witnessed defendant punch Supianoski in the face. There was also a videotape of the incident from the prison surveillance system introduced at trial. A prison nurse treated Supianoski, and observed blood on his face.

Defendant first argues that the trial court abused its discretion when it permitted the prosecutor to admit testimony of a prior assault on a prison employee. We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). MRE 404(b) governs admission of evidence of bad acts. It provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity,

> intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Use of bad acts as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Starr*, 457 Mich 490, 495; 577 NW2d 673 (1998). To be admissible under MRE 404(b), bad acts evidence generally must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Starr, supra*, 457 Mich 496; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). Upon request, the trial court must provide a limiting instruction regarding the use of the bad acts evidence. *Starr, supra* at 498; *VanderVliet, supra* at 75.

Defendant argues that the evidence of a prior assault on a prison employee was not introduced for any proper purpose under MRE 404(b) because it was used only to assault defendant's character as it had no direct connection to the alleged offense. For this reason, defendant asserts that the evidence was substantially more prejudicial than probative. The prosecution counters stating that defendant's defense was that the prosecution had not proven beyond a reasonable doubt that defendant had intended to strike Supianoski, and that Supianoski could have been injured during a "melee." Since defendant's intent was at issue as well as the possibility of accident or mistake, we find that the testimony was admitted for a proper purpose, and was also relevant. *Starr, supra*, 457 Mich 496; *VanderVliet, supra*, 444 Mich 74.

We also agree with the trial court's finding that the evidence was sufficiently more probative than prejudicial under the MRE 403 balancing test. Plainly, the jury already knew defendant was an inmate, thus learning of a prior assault in a prison setting would not cause undue prejudice. In any event, the trial court delivered a limiting instruction, clearly informing the jury on the narrow use of the prior act testimony. *Starr*, *supra* at 498; *VanderVliet*, *supra* at 75. The trial court did not abuse its discretion when it allowed in the evidence of a prior assault on a prison employee under MRE 404(b).

Defendant next argues that the trial court erred when it refused to instruct the jury on the lesser offenses of aggravated assault, and, assault and battery. Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Defendant was charged with assault upon a prison employee, MCL 750.197c. Defendant argues that the trial court erred when it did not instruct the jury on the lesser offenses of aggravated assault, MCL 750.81a, and assault and battery, MCL 750.81 because the evidence supported instruction on these offenses. The trial court denied defendant's request stating that the elements that distinguished the greater offense from the lesser offenses were not sufficiently in dispute to warrant an instruction.

A requested instruction on a necessarily included lesser offense, whether a felony or a misdemeanor, is proper if the charged greater offense requires the jury to find a disputed factual

element that is not part of the lesser included offense and a rational view of the evidence would support it. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Conversely, an instruction on a cognate lesser included offense is not permissible. *Reese, supra; Cornell, supra* at 359. To be supported by a rational view of the evidence, a lesser included offense must be justified by the evidence. Proof on an element differentiating the two crimes must be in dispute sufficiently to allow the jury to consistently find the defendant not guilty of the charged offense but guilty of the lesser offense. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grounds in *Cornell, supra*. A cognate lesser offense is one that shares some common elements with, and is of the same class as, the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

MCL 750.197c provides as follows:

> A person lawfully imprisoned in a jail, other place of confinement established by law for any term, or lawfully imprisoned for any purpose at any other place, including but not limited to hospitals and other health care facilities or awaiting examination, trial, arraignment, sentence, or after sentence awaiting or during transfer to or from a prison, for a crime or offense, or charged with a crime or offense who, without being discharged from the place of confinement, or other lawful imprisonment by due process of law, through the use of violence, threats of violence or dangerous weapons, assaults an employee of the place of confinement or other custodian knowing the person to be an employee or custodian or breaks the place of confinement and escapes, or breaks the place of confinement although an escape is not actually made, is guilty of a felony.

Succinctly, MCL 750.197c is an assault upon a prison employee, while knowing the victim was a prison employee, that occurred while the defendant was lawfully confined in the place of detention. The elements of aggravated assault are 1) an assault without a weapon; 2) the infliction of serious or aggravated injury; and 3) no intent to commit murder or to inflict great bodily harm. MCL 750.81a(1). Aggravated assault pursuant to MCL 750.81a(1) includes the element of causing serious or aggravated injury. This is an additional element not found in the greater offense, assault upon a prison employee, MCL 750.197c. Thus, aggravated assault is not a lesser included offense of assault upon a prison employee and we find that the trial court did not err when it refused to instruct the jury on aggravated assault.

Also, a rational view of the evidence does not support instructing the jury on assault and battery, MCL 750.81. The distinguishing elements between the crimes, specifically that defendant knew Supianoski was a prison employee, and, that defendant was lawfully confined are not in dispute. Since a rational view of the evidence does not support instructing the jury on assault and battery, we find that the trial court did not err in refusing the instruction. *Reese, supra*, 466 Mich 446; *Cornell, supra*, 466 Mich 357.

Defendant argues that he was denied his right to a speedy trial. Determination whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional issue is a question of law subject to de novo review. *People v McLaughlin*, ___ Mich App ___; ___ NW2d ___ (#234433, rel'd 9/25/03) slip op p 3; *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). The right to a speedy

trial is guaranteed to criminal defendants by the federal and Michigan constitutions as well as by statute. US Const, Am VI; Const 1963, art 1, sec 20, MCL 768.1; *People v Cain*, 238 Mich App 95, 111; 605 NW2d 28 (1999). The guarantee applies to all criminal prosecutions and extends to the sentencing portion of the proceedings. *People v Tracy*, 186 Mich App 171, 177; 463 NW2d 457 (1990); *People v Garvin*, 159 Mich App 38, 46; 406 NW2d 469 (1987).

A formal charge or restraint of the defendant is necessary to invoke the speedy trial guarantees. *People v Rosengren*, 159 Mich App 492, 506 n 16; 407 NW2d 391 (1987). Defendant contends that he was arrested on the same day of the incident, March 18, 2000, and that his trial did not commence until January 30, 2002, constituting approximately a twenty-two month delay. Our review of the record reveals that the Felony Information and the Felony Warrant were not issued for the offense until August 17, 2000. Also, a Michigan Uniform Law Citation indicates that defendant was arrested by the Michigan State Police for the offense at issue on August 29, 2000 by Officer Walter Armstrong. Counting from the formal charge, defendant's delay was approximately seventeen months.

Because the delay is under eighteen months, defendant must prove he suffered prejudice as a result of the delay. *People v Collins*, 388 Mich 680, 695; 202 NW2d 769 (1972); *People v Cain, supra*, 238 Mich App 112. We find that defendant has not shown prejudice because there is no indication on the record that potential favorable witnesses or other exculpatory evidence was lost due to the delay. Also, defendant's continued incarceration while he awaited trial on this offense was not prejudicial since he was already serving a prison sentence on another matter. Defendant was not denied his right to a speedy trial.

Finally, defendant argues he is entitled to resentencing because the trial court did not articulate sufficient and compelling reasons to justify an upward departure. Specifically, defendant states that the trial court's reasons were not objective and verifiable. This Court reviews for clear error the trial court's determination of the existence of a sentencing factor. *People v Babcock (Babcock III)*, 469 Mich 247, 273; 666 NW2d 231 (2003), quoting *People v Babcock (Babcock I)*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000). We review de novo the determination that a sentencing factor is objective and verifiable. *Babcock III*, *supra*. The phrase "objective and verifiable" has been defined to mean that the facts to be considered by the court must be actions or occurrences that are external to the minds of the judge, defendant, the prosecution, and others involved in the case, and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

We review for an abuse of discretion the determination that the objective and verifiable factor constitutes a substantial and compelling reason to depart from a mandated minimum sentence. *Babcock III, supra,* at 274. "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id*.

The trial court must impose a minimum sentence within the guidelines range unless a departure from the guidelines is otherwise permitted. MCL 769.34(2); *Babcock III, supra*, at 272, see also 259 n 13. To constitute a substantial and compelling reason for departing from a mandated sentence, a reason must be objective and verifiable, and must irresistibly hold the attention of the court. *Babcock III, supra*, at 257, quoting *People v Fields*, 448 Mich 58, 62, 67; 528 NW2d 176 (1995). A substantial and compelling reason "exists only in exceptional cases." *Babcock III, supra*, at 258, quoting *Fields, supra*, at 62, 67-68.

Our Supreme Court in *Babcock III, supra*, counsels that, "[a] trial court must articulate on the record a substantial and compelling reason for its *particular* departure, and explain why this reason justifies *that* departure." *Babcock III, supra*, at 272, citing MCL 769.34(3) and *People v Daniel*, 462 Mich 1, 9; 609 NW2d 557 (2000). In *Babcock III, supra*, our Supreme Court declares the following:

> [I]f the trial court departs from the guidelines range by twelve months and articulates reasons A, B, and C to justify this departure, and if the Court of Appeals determines that reasons A and B are not substantial and compelling reasons, but that C is, the Court of Appeals must determine whether the trial court would have departed from the guidelines range by twelve months on the basis of reason C alone. *Babcock III, supra*, at 261.

The record indicates that defendant's sentencing guidelines range on the felony conviction as a second habitual offender was twelve to thirty months' imprisonment. The trial court upwardly departed and sentenced defendant to forty-two to seventy-two months' imprisonment. At sentencing, the trial court stated as follows:

> This Court has guidelines of 12 to 30 months. The Court has exceeded the guidelines because I – because the Court is of the opinion that the guidelines do not adequately take into account the defendant's record behavior in the prison system with, as I said, 51 major misconducts, five of them being assault against staff. And he has an assaultive record that goes make at least to 1983, misdemeanor assault in California. He also has a prior felony assault again in California. The presentence report states that he has been apparently diagnosed as an antisocial personality at the Reception and Guidance Center. So the Court has exceeded the guidelines for what the Court thinks are substantial and compelling reasons and this is his prior assaultive record including five prior assaults in the prison system and assaults on prison staff.

We are compelled by the *Babcock III* Court to examine the sentencing record. After our review, we are satisfied that the factors articulated by the trial court are objective and verifiable. *Daniel, supra*, 462 Mich 6-7; *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996). The record supports the fact that defendant had received fifty-one major misconduct tickets while incarcerated with the Michigan Department of Corrections since 1995. The Presentence Investigation Report also states that five of the fifty-one misconducts have been for assault against corrections staff. We find this information "keenly" and "irresistibly" grabs our attention and is of "considerable worth" in deciding the length of the sentence. *Babcock III, supra*, at 272. Again, after reviewing the record in this case and scrutinizing the sentencing transcript, we are certain the trial court departed from the guidelines range on the basis of the objective and verifiable factors that constituted substantial and compelling reasons to depart from the minimum sentence. We find no error in defendant's sentencing.

Affirmed.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Pat M. Donofrio